86-630

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

**BARBARA JEAN CUMMINGS, a Minor, by her Guardian ad Litem, WILLARD P. TECHMEIER, and LAVERNE H. CUMMINGS, Special Administratrix of the ESTATE OF DENNIS G. CUMMINGS,**

*Petitioners,*

VS.

**BRIGGS & STRATTON RETIREMENT PLAN, THE FIRST WISCONSIN TRUST COMPANY, Plan Trustee, and BRIGGS & STRATTON RETIREMENT COMMITTEE, Plan Administrator,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

May a United States District Court be precluded from exercising its equitable powers to impose a constructive trust on funds held by a pension plan in the absence of a clear and valid legislative command?

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**BARBARA JEAN CUMMINGS**, a Minor, by her Guardian ad Litem, **WILLARD P. TECHMEIER**, and **LAVERNE H. CUMMINGS**, Special Administratrix of the **ESTATE OF DENNIS G. CUMMINGS**,

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*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## LOWER COURT DECISIONS

The decision of the United States Court of Appeals for the Seventh Circuit was published at 797 F.2d 383 (7th Cir. 1986) (Appendix A). One of the opinions of the United States District Court for the Eastern District of Wisconsin was published at 606 F.Supp. 659 (E.D. Wis. 1986) (Appendix B). The second district court opinion was to our knowledge not published (Appendix C).

## STATEMENT OF GROUNDS FOR JURISDICTION

This is an appeal from a judgment of the United States Court of Appeals entered on July 21, 1986. This Court's jurisdiction is conferred by 28 U.S.C. Sec. 1254.

## STATEMENT OF THE CASE

Petitioner, Barbara Jean Cummings, is the only surviving minor child of Dennis G. Cummings. Respondent, Briggs & Stratton Retirement Plan (the "Plan") is an employee benefit plan within the scope of ERISA. The terms and conditions of the Plan are bargained for between management and labor of the Briggs & Stratton Corporation and are incorporated into a collective bargaining agreement. Respondent, The First Wisconsin Trust Company, is the trustee of the Plan. Respondent, Briggs & Stratton Retirement Committee, is the Plan administrator.

The late Dennis G. Cummings was an employee of Briggs & Stratton Corporation and a participant in the Plan. He was hired by Briggs & Stratton Corporation in 1952. He had a high school education and lacked sophistication in the area of employee benefits.

The Plan does not contain an automatic survivorship feature, that is, it does not provide that benefits payable to a Plan participant go to the participant's survivor if the participant dies while employed. If the survivor of such a Plan participant is to receive benefits, the participant must have affirmatively elected a payment option

that would include payment to a surviving spouse or beneficiary. Among the options available under the Plan is a "Ten Year Certain and Life Option." This option provides that a Plan participant may elect to receive a reduced pension payable until death, and if the Plan participant's death occurs before the pension has been paid for ten years, payment of the pension will be made in the reduced amount to a beneficiary designated by the Plan participant for the balance of the ten-year period. This option differs from the other options in that it contemplates payment of benefits to a designated beneficiary other than the Plan participant's spouse.

On May 15, 1972, Dennis Cummings and his spouse were divorced in Milwaukee County Circuit Court. The Decree of divorce provided, *inter alia*:

> 9. That all of the rights of the defendant in his pension program at Briggs & Stratton Corporation is (sic) awarded to him and the plaintiff is divested of all right, title and interest therein providing, however, that the defendant shall change the beneficiary therein to the name of the minor children of the parties and each child shall be divested of such right when he or she reach the age of eighteen (18) years.

Under the terms of the Plan, Mr. Cummings could not have designated his daughter as a beneficiary at the time the decree was entered. None of the defendants in this action were parties to the divorce proceeding. However Briggs & Stratton's records include information that Mr. Cummings was divorced.

In 1978, when Mr. Cummings approached his sixtieth birthday, the Retirement Committee mailed to him information about the Fifty Percent Joint and Survivor Pension Option. This option provides for payment of a monthly annuity to a Plan participant's spouse if the participant

dies before retiring. Cummings replied that he would not elect the option, stating: "I am single and not eligible for this retirement plan."

On December 4, 1981, when Mr. Cummings approached his thirtieth year of service, the Retirement Committee mailed to him a packet of information explaining the pre-retirement options available to him under the Plan. He did not respond to this mailing.

In May 1982, Mr. Cummings was diagnosed as having lung cancer. Shortly thereafter, it was determined that his condition was terminal. He was hospitalized but returned home in late June 1982. He gradually became confused and disoriented.

On June 29, 1982, the Retirement Committee sent Mr. Cummings the same information that had been sent to him the previous December. Both times he was told that if he did not elect a survivorship option, no one would receive any pension benefits if he died while still employed. However, Mr. Cummings never returned an application form for a survivorship option.

Mr. Cummings died on August 1, 1982. He never designated his minor children as pension beneficiaries, as the divorce decree required.

A beneficiary of Mr. Cummings' pension under the Ten Year Certain and Life Option would have been entitled to a monthly payment of $642.58 commencing on the first day of the month following Mr. Cummings' death. Since Mr. Cummings died on August 1, 1982, the first payment was due September 1, 1982. No payments were made.

A civil action seeking damages for the unpaid pension benefits was commenced. The United States District Court for the Eastern District of Wisconsin, The Honorable John

W. Reynolds presiding, granted summary judgment for the petitioners. The respondents appealed and the United States Court of Appeals for the Seventh Circuit reversed and dismissed the petitioners' complaint.

## JURISDICTION OF THE DISTRICT COURT

The subject matter for the underlying action was pursuant to 29 U.S.C. Sec. 1132(e) and 28 U.S.C. Sec. 1331.

## ARGUMENT

The Court of Appeals for the Seventh Circuit stated the issue of this case as follows:

> The issue in this case is whether a district court has inherent or statutory equitable power to fashion a constructive trust in favor of a plaintiff who has no entitlement to benefits under ERISA.

(App. A at 1) The court held:

> Although we do not deny that pension beneficiaries may bring civil actions under ERISA to obtain appropriate equitable relief, we cannot approve of such relief where there is no violation of ERISA under the written terms of the plan.

(App. A at 2)

In reaching its decision the court of appeals focused on the absence of any violation of ERISA saying:

> By this decision we do not diminish the inherent and statutory equitable power of the federal courts in ERISA cases. Instead, we restrict that power to its proper use—to remedy violations of the Act.

(App. A at 13)

The problem is that in so holding the court of appeals did diminish the inherent equitable powers of the federal courts. It also impliedly overruled this Court's decisions in the cases of *Porter v. Warner Co.*, 328 U.S. 395 (1946) and *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960). In so doing the court of appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's jurisdiction.

This Court, in the case of *Porter v. Warner Co., supra*, held that:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.

328 U.S. at 398. The Court delineated this power saying:

> Power is thereby resident in the District Court in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." (Citation Omitted)

*Id.* The Court went on to elaborate on the equitable powers of the Federal Courts, stating:

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles

> of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." (Citations Omitted)

*Id.*

In *Mitchell v. DeMario Jewelry, supra,* this Court reaffirmed *Porter v. Warner Co., supra* and specifically rejected the appellate court's holding that equitable jurisdiction "must be expressly conferred by an Act of Congress or be necessarily implied from a congressional enactment." 361 U.S. at 290.

In the instant case the court of appeals limited equitable jurisdiction to those situations involving violations of ERISA under the written terms of a pension plan. In so doing it took the same position as that taken by the appellate court in *Mitchell v. DeMario Jewelry, supra,* i.e. that equitable relief is available only where specifically provided for by an Act of Congress.

In this case the wrongdoing of one person (Dennis G. Cummings) caused property rightfully belonging to another person (Barbara Jean Cummings) to come into the possession of a third party (The Briggs & Stratton Retirement Plan). In focusing on the lack of wrongdoing by the Plan the court of appeals ignored Mr. Cummings' wrongdoing and its effect on Barbara Jean. In holding that Barbara Jean had no federal remedy the court of appeals in effect held that she had no remedy at all since any state court action against the Plan would have been dismissed on preemption grounds.

In this case the court of appeals has acted in such a manner so as to limit and diminish the inherent and equitable powers of the federal courts. In so doing it has also impliedly overruled at least two decisions of this Court.

This Court should exercise its power of supervision to review the decision of the court of appeals.

Respectfully submitted,

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# APPENDIX A

## IN THE
## UNITED STATES COURT OF APPEALS
## FOR THE SEVENTH CIRCUIT

Nos. 85-2871 and 85-2936

BARBARA JEAN CUMMINGS, a minor, by her Guardian ad Litem, WILLARD P. TECHMEIER, and LAVERNE H. CUMMINGS, Special Administratrix of the Estate of Dennis G. Cummings,

*Plaintiffs-Appellees,*
*Cross-Appellants,*

*v.*

BRIGGS & STRATTON RETIREMENT PLAN, THE FIRST WISCONSIN TRUST COMPANY, Plan Trustee, and BRIGGS & STRATTON RETIREMENT COMMITTEE, Plan Administrator,

*Defendants-Appellants,*
*Cross-Appellees.*

Appeals from the United States District Court for the Eastern District of Wisconsin.
No. 83-C-722—**John W. Reynolds,** *Judge.*

ARGUED MAY 29, 1986—DECIDED JULY 21, 1986

Before BAUER and POSNER, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* The issue in this case is whether a district court has inherent or statutory equitable power to fashion a constructive trust in favor of a plaintiff who has no entitlement to benefits under ERISA.

Although we do not deny that pension beneficiaries may bring civil actions under ERISA to obtain appropriate equitable relief, we cannot approve such relief where there is no violation of ERISA under the written terms of the plan. For the reasons set out below, we reverse the district court's grant of summary judgment in favor of the plaintiffs.

## I

The decedent, Dennis G. Cummings, was an employee of Briggs & Stratton Corporation, hired in 1952. He was a participant in the Briggs & Stratton Retirement Plan ("the Plan"), an employee-benefit program bargained for with the Allied Industrial Workers, Local 232 ("the Union"), and incorporated into the collective bargaining agreement. Defendant First Wisconsin Trust Company is trustee of the Plan. Defendant Briggs & Stratton Retirement Committee ("the Committee") is the administrator of the Plan. Defendant Frank Sprtel is a member of the Committee.

The Plan does not contain an automatic survivorship feature. Rather, participants must affirmatively *elect* a payment option that would include payment to a surviving spouse or beneficiary. Among the options available is a "Ten Year Certain and Life Option" (Article VI, § 604(a) of the Plan). It provides that a Plan participant may elect to receive a reduced pension payable until death, and if the Plan participant's death occurs before the pension has been paid for ten years, payment of the pension will be made in the reduced amount to a beneficiary designated by the Plan participant for the balance of the ten-year period. The total benefits to the participant receiving a reduced monthly pension during his lifetime and the participant's beneficiary are actuarially equivalent to a single life pension without any provisions for his survivors.

The Union has sought to modify the Plan so that survivorship benefits are paid automatically, without election, at a participant's death. As it stands now, if a participant does not elect one of the survivorship options, no

benefits are payable to anyone at the time of the participant's death. Briggs & Stratton has opposed an automatic survivorship benefit provision because of the substantial additional expense of funding this feature. Because Briggs & Stratton has prevailed on this bargaining point, the Plan does not provide for automatic survivorship benefits.

On May 15, 1982 Cummings was divorced in Milwaukee County Circuit Court. The decree of the divorce provided, in part:

> 9. That all of the rights of the defendant in his pension program at Briggs & Stratton Corporation are awarded to him and the plaintiff is divested of all right, title and interest therein providing, however, that the defendant shall change the beneficiary therein to the name of the minor children of the parties and each child shall be divested of such right when he or she reaches the age of eighteen (18) years.

At the time the divorce decree was entered into, Cummings was not eligible to designate his daughter, Barbara Jean, as a beneficiary. None of the defendants were parties to the divorce proceedings. Briggs & Stratton's employment record includes information that Cummings was divorced, but it is undisputed that none of the defendants had knowledge of the terms of the decree.

In 1978 when Cummings approached his sixtieth birthday, the Committee mailed him information about the "Fifty Percent Joint and Survivorship Pension Option" available under sections 6.1 and 6.2 of the Plan. This option provides for payment of a monthly annuity to the spouse of the Plan participant, if the participant should die before retiring from the Company. No other beneficiary could be named. Cummings replied that he would not elect the option, stating: "I am single and not eligible for this retirement plan."

On December 4, 1981, when Cummings approached his thirtieth year of service with Briggs & Stratton, the Committee mailed him a packet of information explaining the pre-retirement options for which he was now eligible. The

options included the "Ten Year Certain and for Life" option which allowed him to choose someone as his beneficiary in the Plan in the event of his death; by choosing that option, Cummings would receive a reduced pension during his lifetime. Cummings did not respond to this mailing.

In May 1982 Cummings was diagnosed as having lung cancer. On May 13 Cummings was terminated by Briggs & Stratton because of his illness. Shortly thereafter, it was determined that his condition was terminal. He was hospitalized, but returned home in late June. Cummings gradually became mentally confused and disoriented.

On June 29, 1982 the Committee mailed Cummings the same information sent to him previously. Both packets of information contained the following warning notice: "NOTE: If you do not elect a survivorship option, no one will receive any pension benefits if you die while still employed." However, Cummings did not complete and return the application form for survivorship benefits.

Cummings died on August 1, 1982. To the date of his death, he had never received any benefits from the Plan. He had not designated his daughter, Barbara Jean, his only surviving minor child, as a pension beneficiary; had he done so, the beneficiary would have been entitled to a monthly payment of $642.58 commencing on the first day of the month following Cummings' death.

On August 11 Barbara Jean Cummings, through an attorney, wrote to the Committee requesting a statement of the amount of benefits due her. Frank Sprtel, representing the Committee, replied that no benefits were due; when Barbara Jean made a second request for information in March 1983, the Committee reiterated that no benefits would be paid.

Plaintiffs Barbara Jean and LaVerne Cummings (the former spouse and special administratrix of the Cummings' estate) filed an action for benefits and statutory penalties under the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiffs contended that the Plan must

pay survivorship benefits to Barbara Jean according to the provision in the divorce decree even though Cummings did not elect a survivorship option under the Plan. Plaintiffs also alleged that defendants filed to comply with requests for information in violation of ERISA, entitling them to statutory penalties.

Plaintiffs began their lawsuit on June 2, 1983. Defendants filed a motion for summary judgment dismissing the complaint on the grounds that under the written terms of the Plan, survivorship benefits are not payable automatically when a Plan participant dies. Plaintiffs also filed for summary judgment on the basis that defendants did not adequately inform Cummings of his rights to elect a survivorship option and that defendants knew or should have known of Cummings' state of mental confusion.

In its decision of April 19, 1985 the district court granted defendants' motion to dismiss Sprtel and denied plaintiff's motion for statutory penalties for the alleged failure to comply with a request for information. The district court, on the other hand, granted summary judgment for plaintiffs on the ground that the Plan would be "unjustly enriched" if it did not pay benefits to plaintiffs.

On September 27, 1985 the district court denied defendants' motion for reconsideration and entered judgment for the plaintiffs in the amount of $59,713.67, plus interest. Defendants appeal that judgment, and plaintiffs cross-appeal on the calculation of damages.

## II

The issue here is initially straightforward. This is an action for benefits and statutory penalties under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. All employee benefit plans must be "established and maintained pursuant to a written instrument," section 1102(a)(1), and ERISA plan administrators are required to act consistently with the Plan's written terms. Plan fiduciaries are required to act solely in "accordance with the documents and instruments govern-

ing the plan." Section 1104(a)(1)(D). In fact, the 1984 amendment to ERISA specifically forbids the assignment or alienation of plan benefits unless called for under the Plan.[1]

ERISA also requires that the description "be written in a manner calculated to be understood by the average plan participant and . . . be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 28 U.S.C. § 1022(a)(1). It is uncontested that the summary plan description for Briggs & Stratton was complete and accurate. In addition, Briggs & Stratton sent Cummings two letters, including clear warnings of the effect of not designating a surviving beneficiary.

There is no question that the written terms of the Briggs & Stratton Retirement Plan met the requirements of ERISA, or that under the terms of the Plan the plaintiffs were not entitled to receive benefits. The Plan lacks an automatic survivorship feature; therefore, the option for payment to a surviving beneficiary under Article VI, § 6.14(a), the "Ten Year Certain and Life Option," requires affirmative election. Under the technical terms of the Plan, defendants violated no provisions of ERISA and committed no legal wrong.

There is also no question that the Plan administrators had not violated any fiduciary responsibility mandated by ERISA. Briggs & Stratton took the steps it was required to make under the law: it printed an accurate plan summary for its 10,000 Plan participants, made an office available, and mailed information with respect to the elective options. In a similar case, where the decedent did not

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[1] The Retirement Equity Act of 1984 (effective January 1, 1985) amends section 206(d) of ERISA, 29 U.S.C. § 1056(d), as follows:

> Assignment or alienation of plan benefits.
>
> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

make any effort to contact a knowledgeable company employee for further information or explanation, the district court held that the plan administrator satisfied the fiduciary obligation owed to the decedent. The court explicitly stated that "fiduciaries are not expected to provide individualized attention to participants." *Lee v. Union Elec. Co.*, 606 F. Supp. 316, 321 (E.D. Mo. 1985). An opposite interpretation would impose an almost impossible burden on ERISA plan administrators to seek out and maintain sufficient current information about the health and individual needs of each plan member to enable the administrators to render personal service. *Allen v. Atlantic Richfield Retirement Plan*, 480 F. Supp. 848, 850 (E.D. Pa. 1979), *aff'd*, 633 F.2d 209 (3d Cir. 1980).

In the instant case, the district court acknowledged that the Plan administrators had fulfilled their fiduciary duty, concluding:

> In the present case, the Retirement Committee has been essentially passive with respect to the benefits in question. If there has been any wrongdoing, it is attributable to Dennis Cummings.

*Cummings by Techmeier v. Briggs & Stratton Ret.*, 606 F. Supp. 659, 664 (E.D. Wis. 1985). The defendants had clearly complied with both the written terms of the Plan and their fiduciary duties. That should have ended the matter.

However, the district court based its opinion on the "unusual circumstances" of this case. A second written document conflicted with the Plan: the divorce decree negotiated between Dennis Cummings and his former wife, LaVerne Cummings (now special administratrix of the Cummings' estate), in which she divested herself of all right, title, and interest in Dennis Cummings' pension in exchange for his promise to change the beneficiary under the pension to name his minor children. At the time Cummings signed the decree, he was not yet eligible to designate a wife or child. When he reached his thirtieth year of employment and was offered the chance to re-

spond and elect to name his child as a beneficiary, he did not do so.

Therein lies the difficulty with this case. The district judge was faced with a situation where the technical written requirements of ERISA had been satisfied by the defendants, as had their fiduciary responsibilities. But the equally compelling written terms of the divorce decree had been violated. Dennis Cummings had not done for his child what he had promised to do, and what his former wife had bargained for in the course of the divorce proceedings. The minor child consequently lost financial benefits she would have been entitled to receive from her father's estate.

The recent amendments to ERISA of the 1984 Act explicitly deal with this dilemma, recognizing a "qualified domestic relations order" and allowing payments of benefits pursuant to it.[2] That new provision contains requirements: the domestic relations order must specify the participant's payee, the amount to be paid, and the plan to which the order applies. Most importantly, the amendments allow payment only if the domestic relations order does not require a benefit not otherwise provided for under the plan. The divorce order cannot create a new pension benefit where none existed, increase benefits, or require an alternate payee.[3]

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[2] The prohibition on assignment or alienation of plan benefits of section 206 of ERISA, 29 U.S.C. § 1056, Retirement Equity Act of 1984 (effective January 1, 1985) has an exception for:

> 3(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

[3] Section 206(D) of ERISA, 29 U.S.C. § 1056, reads:

> A domestic relations order meets the requirements of this subparagraph only if such order—

(Footnote continued on following page)

It is true that a judge may treat domestic orders entered before the 1985 effective date of the amendments as "qualified" domestic orders even though the documents do not meet the new requirements;[4] there are, however, strong reasons why we should not treat the Cummings' decree as overriding the written terms of the the Briggs & Stratton Plan. Notice of Cummings' divorce was never made part of the records at Briggs & Stratton. Plaintiffs concede that the Plan administrators had no knowledge of the decree's provisions. Briggs & Stratton had no legitimate reason to expect to pay benefits to any beneficiary named by Cummings; benefits made payable to Cummings' minor child ordered by the court would be created where none existed before.

The funding for the Briggs & Stratton Plan, like any pension plan's funding, depends on stability and predictability. Sound administration of a pension plan demands advance planning. Forcing trustees of a plan to pay benefits which are not part of the written terms of the program disrupts the actuarial balance of the Plan and potentially jeopardizes the pension rights of others legitimately entitled to receive them. As the Eighth Circuit has em-

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[3] *continued*

(i) does not require a plan to provide any type or form of benefits, or any option, not otherwise provided under the plan.

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

[4] In the case of a domestic relations order entered before January 1, 1985 (such as the Cummings' divorce decree), the pension plan administrator "shall" treat such order as a qualified domestic relations order if the administrator is paying benefits pursuant to "such order on such date" (which does not apply here), or "may so" treat the order even though it does not meet the requirements of such amendments.

phasized in *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976), there is danger when courts tamper with the written terms of a pension plan: "The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan."

The doctrine of "unjust enrichment," which was invoked by the district court, does not make sense in this context of actuarial planning. A pension fund is not "unjustly enriched" where a pensioner dies early with no benefits payable to his survivor. That eventuality simply offsets cases where a pensioner lives well into old age and more benefits are paid to him than were statistically predictable. There are sound reasons why Cummings' divorce decree should not alter the written terms of his pension plan to create a beneficiary where none existed before.

At this point, however, we must address the most troublesome aspect of this case: the unresolved ambiguity concerning the reason why Cummings failed to elect the survivorship option. Our discussion to date has assumed that Cummings made a conscious rational choice to trade higher lifetime pension payments for himself by not electing to designate a surviving beneficiary. But plaintiffs have argued in district court that Cummings made his choice out of mistake or confusion, aided and abetted by Briggs & Stratton. In opposing the grant of summary judgment in favor of Briggs & Stratton, plaintiffs alleged that the plan administrators did not adequately inform Cummings of his right to elect a survivorship option, that he was confused about his rights under the Plan, and that defendants knew or should have known of his confusion.

At the district court proceedings, plaintiffs' counsel alleged that Dennis Cummings was unsophisticated in business matters, relied on the personnel at Briggs & Stratton, and should have been made aware by a telephone call of his options. Counsel also raised a question as to the degree of awareness of Briggs & Stratton as

to the divorce decree and its terms. Finally, counsel alleged that at the time Cummings was mailed the second notice in May 1982, he was incapacitated and could not accept the certified letter at his door; therefore, the letter was returned to Briggs & Stratton as undeliverable. Dist. Ct. Tr., pp. 14, 17, 20, 21.

All of the above allegations amount to a serious charge of breach of fiduciary duty against Briggs & Stratton. Yet, because plaintiffs' motion to compel discovery on this issue was made in an untimely fashion and denied by the district court, we are given no hard, factual material to prove that Briggs & Stratton's plan administrators did less than they would normally do, much less that they affirmatively misled Cummings. Plaintiffs do not raise this issue in their appeal. Indeed, at oral argument, plaintiffs' counsel agreed that no additional notice to Cummings was required. Were such evidence of fiduciary breach before us, this would be a different case, but in its absence we cannot find that Briggs & Stratton acted in an unusual or unfair manner so as to justify a constructive trust.

The district court concluded, nevertheless: "Yet the mere fact that the defendants may have received the proceeds innocently is itself no bar to the imposition of a constructive trust." *Id.* We disagree. There is no property "owned" by the third-party beneficiary, Barbara Cummings, illegally retained by the pension fund. Thus, we distinguish the insurance cases relied on by the district court where there is a settlement due someone and the issue is whether the property is justly being held in the right hands.[5] *See, e.g., Richards v. Richards*, 58 Wis. 2d, 297, 206 N.W.2d 134, 137 (1973).

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[5] We disagree with the district court that the pension setting is analogous to the insurance setting. See *Cummings by Techmeier v. Briggs & Stratton Ret.*, 606 F. Supp. at 664. In an insurance case where a party designates a beneficiary under a policy agreement and ignores a final divorce decree requiring that a different party be so designated, there is a definite settlement due some person. Because the insurance company is obligated to pay bene-

(Footnote continued on following page)

Enrichment is not "unjust" where it is allowed by the express terms of the pension plan. *Craig v. Bemis Co.*, 517 F.2d 677, 684 (5th Cir. 1975). The Restatement of Restitution makes clear that "a person is not entitled to compensation on the ground of unjust enrichment if he received from the other that which it was agreed . . . the other should give in return." Section 107, & Comment 1. We conclude that the basic elements that make up a claim of unjust enrichment are simply not present in the case before us.

This is not to suggest that when a legal wrong *has* occurred that a district court does not have a full panoply of equitable powers to fashion appropriate relief. Imposition of a constructive trust may be an appropriate remedy where pension administrators are guilty of a breach of fiduciary responsibility. The Supreme Court has historically emphasized the inherent equitable jurisdiction of district courts. *See, e.g., Mitchell v. DeMario Jewelry*, 361 U.S. 288, 291 (1960), which states explicitly that "unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."

The district court also has statutory equitable jurisdiction; ERISA provides that a pension beneficiary may bring a civil action to obtain "appropriate equitable relief." 29 U.S.C. § 1132(a)(3)(B). The enforcement provisions of ERISA are intended to provide broad, flexible remedies to redress or prevent statutory violations. *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 302 (7th Cir. 1985). In appropriate circumstances, courts may develop a federal common law governing employee benefit plans in

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[5] *continued*
fits, the divorce decree has created an equitable right in those funds to one party. Designation of a beneficiary other than the one contemplated by the divorce decree causes unjust enrichment and is properly remedied by a constructive trust. However, in the pension case before us, there are no benefits due any third party under the written terms of the Plan, because the Plan participant failed to elect those benefits. Thus, there is no equitable right and no proper place for a constructive trust.

order to supplement the statutory scheme. *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402, 1419 (2d Cir. 1985); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir: 1984).

However, where Congress has established an extensive regulatory network and expressly announced its intention to occupy the field, federal courts should not create additional rights under the rubric of federal common law. We are particularly reluctant to fashion a federal common-law doctrine of unjust enrichment when such a right would override a contractual provision in a pension plan. The existence of such a contract, negotiated between the parties, requires a particularly strong indication that the unjust enrichment doctrine will vindicate an important statutory policy. *Van Orman v. American Ins. Co.*, 680 F.2d 306, 310-13 (3d Cir. 1982). In only limited circumstances will courts need to supplement the specific statutory sections. *Amato*, 773 F.2d at 1419. The case at bar does not present one of those circumstances.

By this decision, we do not diminish the inherent and statutory equitable power of the federal courts in ERISA cases. Instead, we restrict that power to its proper use—to remedy violations of the Act. For the reasons given above, we reverse the district court's grant of summary judgment in favor of plaintiffs and grant the summary judgment dismissing the complaint in favor of the defendants.

REVERSED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 21, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

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BARBARA JEAN CUMMINGS, a minor, by her Guardian ad Litem, WILLARD P. TECHMEIER, and LAVERNE H. CUMMINGS, Special Administratrix of the ESTATE OF DENNIS G. CUMMINGS,

*Plaintiffs-Appellees, Cross-Appellants,*

Nos. 85-2871, 85-2936 vs.

BRIGGS & STRATTON RETIREMENT PLAN, THE FIRST WISCONSIN TRUST COMPANY, plan trustee and BRIGGS & STRATTON RETIREMENT COMMITTEE, plan administrator,

*Defendants-Appellants, Cross-Appellees.*

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Appeals from the United States District Court for the
Eastern District of Wisconsin.
No. 83 C 722—**John W. Reynolds**, *Judge.*

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This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

# APPENDIX B

[Filed April 19, 1985]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARBARA JEAN CUMMINGS, a minor, by her Guardian ad Litem, WILLARD P. TECHMEIER, and LAVERNE H. CUMMINGS, Special Administratrix of the ESTATE OF DENNIS G. CUMMINGS,

*Plaintiffs,*

v.

BRIGGS & STRATTON RETIREMENT PLAN, THE FIRST WISCONSIN TRUST COMPANY, plan trustee, and BRIGGS & STRATTON RETIREMENT COMMITTEE, plan administrator, and FRANK J. SPRTEL,

*Defendants.*

Civil Action
No. 83-C-722

## DECISION AND ORDER

This is an action for benefits and statutory penalties under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Federal jurisdiction is based on 28 U.S.C. § 1331.

The complaint contains two counts. First, plaintiffs contend that benefits are payable and owing to Barbara Jean Cummings by virtue of her status as beneficiary of the

Briggs & Stratton Retirement Plan. Second, plaintiffs contend that the defendants failed to comply with a request for information, in violation of 29 U.S.C. §§ 1025(a) and 1132(c). Presently before the Court are (1) plaintiffs' motion to compel discovery; (2) defendants' motion to dismiss defendant Frank J. Sprtel; (3) plaintiffs' oral motion for summary judgment, which was made at the close of a hearing on August 16, 1984; (4) defendants' motion to dismiss defendant First Wisconsin Trust Company; (5) defendants' motion for summary judgment; and (6) defendants' unopposed motion to strike plaintiffs' jury demand. The motions are treated *seriatim*. In substance, I conclude that the plaintiffs are entitled to judgment with respect to their claim for benefits on the basis of the present record, and therefore, their motion for summary judgment will be granted in part. I further conclude that the amount of benefits to be awarded cannot be determined on the basis of the present record, and therefore, the parties will be directed to submit information on this point. I further conclude that the defendants are entitled to summary judgment on the claim for statutory penalties.

The following facts are not in dispute. Plaintiff Barbara Jean Cummings is a minor resident of Milwaukee, Wisconsin, and is the surviving child of Dennis G. Cummings. Plaintiff LaVerne H. Cummings is the special administratrix of the estate of Dennis G. Cummings and was formerly Dennis G. Cummings's spouse. Defendant Briggs & Stratton Retirement Committee Plan ("the Plan") is an employee benefit plan within the meaning of 29 U.S.C. § 1132(d). The terms and conditions of the Plan are bargained for between management and labor of the Briggs & Stratton Corporation, and are incorporated into a collective bargaining agreement. Defendant The First Wisconsin Trust Company is a Wisconsin trust company bank and the trustee of the Plan. Defendant Briggs & Stratton Retirement Committee ("the Retirement Committee") is the administrator of the Plan. Defendant Frank J. Sprtel is a member of the Retirement Committee.

Dennis G. Cummings, now deceased, was an employee of the Briggs & Stratton Corporation and a participant in the Plan. He was hired by the Briggs & Stratton Corporation in 1952. He had a high school education and lacked sophistication in the area of employee benefits.

The Plan does not contain an automatic survivorship feature, that is, it does not provide that benefits payable to a Plan participant go to the participant's survivor if the participant dies while employed. If the survivor of such a Plan participant is to receive benefits, the participant must have affirmatively elected a payment option that would include payment to a surviving spouse or beneficiary. Among the options available under the Plan is a "Ten Year Certain and Life Option." This option is set forth in Article VI, § 6.4(a) of the Plan. It provides that a Plan participant may elect to receive a reduced pension payable until death, and if the Plan participant's death occurs before the pension has been paid for ten years, payment of the pension will be made in the reduced amount to a beneficiary designated by the Plan participant for the balance of the ten-year period. This option differs from the other options in that it contemplates payment of benefits to a designated beneficiary other than the Plan participant's spouse.

On May 15, 1972, Dennis Cummings and his spouse were divorced in Milwaukee County Circuit Court. The decree of divorce provided, *inter alia*,

> 9. That all of the rights of the defendant in his pension program at Briggs & Stratton Corporation is awarded to him and the plaintiff is divested of all right, title and interest therein providing, however, that the defendant shall change the beneficiary therein to the name of the minor children of the parties and each child shall be divested of such right when he or she reach the age of eighteen (18) years.

Under the terms of the Plan, Mr. Cummings could not have designated his daughter as a beneficiary at the time

the decree was entered. None of the defendants in the present action were parties to the divorce proceeding. However, Briggs & Stratton Corporation's records include information that Mr. Cummings was divorced.

In 1978, when Mr. Cummings approached his sixtieth birthday, the Retirement Committee mailed to him information about the Fifty Percent Joint and Survivor Pension Option available under §§ 6.1 and 6.2 of the Plan. This option provides for payment of a monthly annuity to a Plan participant's spouse if the participant dies before retiring. Cummings replied that he would not elect the option, stating: "I am single and not eligible for this retirement plan."

On December 4, 1981, when Mr. Cummings approached his thirtieth year of service, the Retirement Committee mailed to him a packet of information explaining the preretirement options available to him under the Plan. He did not respond to this mailing.

In May 1982, Mr. Cummings was diagnosed as having lung cancer. Shortly thereafter, it was determined that his condition was terminal. He was hospitalized but returned home in late June 1982. He gradually became confused and disoriented.

On June 29, 1982, the Retirement Committee sent Mr. Cummings the same information that had been sent to him the previous December. Both times he was told that if he did not elect a survivorship option, no one would receive any pension benefits if he died while still employed. However, Mr. Cummings never returned an application form for a survivorship option.

Mr. Cummings died on August 1, 1982. He never designated his minor children as pension beneficiaries as the divorce decree required.

On or about August 11, 1982, Barbara Jean Cummings, through a legal representative, wrote to the Retirement Committee requesting a statement of the amount of bene-

fits due her. The Retirement Committee, through Frank J. Sprtel, replied on or about August 13, 1982, stating that no benefits were due and that the matter would be referred to legal counsel. A second letter, dated August 23, 1982, confirmed that no benefits would be paid. Barbara Jean Cummings made a second request on or about March 30, 1983. On April 6, 1983, counsel for the Retirement Committee wrote to her, again informing her that no benefits would be paid. This action was filed soon thereafter.

1. The plaintiffs' motion to compel discovery is denied. The issues with respect to which plaintiffs seek evidence are whether the Retirement Committee had actual or constructive knowledge of the terms of Dennis Cummings's divorce decree, whether the Retirement Committee knew Dennis Cummings was unaware of or misunderstood the terms of the divorce decree, and whether the Retirement Committee or its agents misled him with respect to the options available under the Plan. Resolution of these issues is unnecessary to a determination of these motions. Moreover, plaintiffs' request for discovery was untimely.

2. The defendants' motion to dismiss defendant Frank J. Sprtel is granted. The proffered statutory basis for Mr. Sprtel's liability is 29 U.S.C. § 1132(c) which provides:

> Administrator's refusal to supply requested information. Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

However, the Retirement Committee is the administrator of the Plan for the purpose of this subsection, not Mr. Sprtel. Because the relief plaintiffs seek cannot be granted against Mr. Sprtel in his individual capacity, the claim against him will be dismissed with prejudice.

3. Turning next to the substance of the first claim for relief, I observe that the undisputed facts raise a question respecting Dennis Cummings's intentions. It is not clear why he did not designate Barbara Jean Cummings as a beneficiary, as the divorce decree required. A reading of the Plan's description leads to the conclusion that Mr. Cummings's pension payments would have been larger if he did not designate a surviving beneficiary. Thus, there may have been a calculated choice on his part not to elect the survivorship option. However, the documents relevant to his insurance benefits, which have been submitted to the court, disclose that he intended that his children be provided for if he were injured. This suggests that he would have wanted Barbara Jean Cummings to receive pension benefits, if possible. His lack of understanding of the options available to him, as evidenced by his response to the 1978 mailing, supports the conclusion that he did not know this was possible. Mr. Cummings therefore may have committed a mistake when he did not designate Barbara Jean Cummings as a beneficiary, or his omission may have been fraudulent and contumacious. There is evidence to support either conclusion.

However I need not determine whether Mr. Cummings's omission was deliberate, because equity provides a remedy that would be available to plaintiffs in either instance. The result derives from the equitable doctrine of constructive trusts.

In actions under ERISA, federal courts have the full panoply of equitable powers to fashion appropriate relief. *See, e.g., Hillis v. Waukesha Title Co.*, 576 F.Supp. 1103 (E.D Wis. 1983); *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629 (W.D. Wis. 1979). There exists a federal common law of trusts, *see, e.g., Free v. Bland*, 369 U.S. 663

(1962), and this body of law is fully applicable to actions for benefits under ERISA.

Under traditional notions of equity, a Court may impose a constructive trust where a party unfairly holds property that justly belongs to another. The primary purpose of this device is to prevent unjust enrichment of the party unfairly holding the constructive trust *res*. The rights and duties of the parties are to be the same as if the party holding the property had been, from the beginning of his inequitable holding, an express trustee for the other. The Court must fund that the party holding the property has been under an equitable duty to give to the other the benefit of the property ever since he began to hold unjustly. The property must have been acquired by some means that equity may regard as unconscionable, unjust, or unfair. However, it is not necessary that the property has been acquired by fraud, insofar as that term denotes intentional misrepresentation and *scienter*. *See* G. Bogert, Trusts & Trustees § 471 (rev. 2d ed. 1978).

Courts in other jurisdictions have imposed constructive trusts in cases where a party designates another party as beneficiary under an insurance agreement, notwithstanding a final divorce decree requiring that a third party be so designated. *See, e.g., Hodspeth v. Stokes*, 644 S.W. 2d 92 (Tex. Civ. App. 1982); *Noll v. Brende*, 318 N.W.2d 319 (S.D. 1982); *Richards v. Richards*, 58 Wis.2d 290; 206 N.W.2d 134 (1973). *See also Simonds v. Simonds*, 408 N.Y.S.2d 359, 45 N.Y.2d 233, 380 N.E.2d 189 (1978) (requirement in separation agreement). The facts of these cases support a conclusion that the divorce decree created an equitable right to the benefits, and that the designation of a beneficiary other than the one contemplated by the divorce decree caused unjust enrichment.

In the present case, the Retirement Committee has been essentially passive with respect to the benefits in question. If there has been any wrongdoing, it is attributable to Dennis Cummings. Yet the mere fact that the

defendants may have received the proceeds innocently is itself no bar to the imposition of a constructive trust.

> "Where a person holding property transfers it to another in violation of his duty to a third person, the third person can reach the property in the hands of the transferee [by means of a constructive trust] unless the transferee is a bona fide purchaser."

*Richards v. Richards*, 58 Wis.2d at 298, 206 N.W.2d at 138 (1973), *quoting* 5 Scott, Trusts § 470 (3d ed. ____).

Likewise, the possibility that Dennis Cummings's omission to designate Barbara Jean Cummings as a beneficiary was the result of mistake or inadvertence rather than fraud does not preclude imposition of a constructive trust. As discussed earlier, fraud is not the *sine qua non* of unjust enrichment, and a unilateral mistake may form the basis for a constructive trust in appropriate cases. *Richards v. Richards*, 58 Wis.2d at 297, 206 N.W.2d at 137 (1973); *Maryland National Bank v. Tower*, 374 F.2d 381, 382-83 (3d Cir. 1967) (applying Maryland law); G. Bogert, Trusts & Trustees, § 474 (rev. 2d ed. 1978).

The undisputed facts lead me to conclude that a constructive trust should be imposed on proceeds within the defendants' control. Dennis Cummings had an equitable duty to designate Barbara Jean Cummings as the beneficiary under the Plan, and thus he became the constructive trustee. Under the Plan, the defendants (other than Mr. Sprtel) are his successors. The proceeds that Barbara Jean Cummings would have received had her father discharged his duty are the trust *res*, and Barbara Jean Cummings is the constructive *cestui que* trust. The defendants have been under a duty to convey the trust *res* to Barbara Jean Cummings since the time of her father's death, and to allow the *res* to remain within the defendants' control would unjustly enrich them.

The defendants argue that awarding relief to the plaintiffs would be tantamount to rewriting the collective bargaining agreement to provide for an automatic survivor-

ship option. They urge that ERISA does not provide an avenue for judicial modification of contracts between labor and management.

The relief awarded here is not a general restructuring of the collective bargaining agreement. It merely remedies an inequitable situation created by unusual circumstances. Any party seeking similar relief from the operation of the terms of the Plan would have to prove the existence of the unusual circumstances present here.

Finding that the defendants hold a sum in constructive trust for the plaintiffs, the next issue involves the precise amount plaintiffs are to be awarded. Because this amount cannot be determined on the basis of the present record, only partial summary judgment can be granted for the plaintiffs. I think the remaining question can now be resolved privately. However, because the parties may dispute the amount plaintiffs are due, the plaintiffs are directed to submit within ten days of the filing date of this order an affidavit and any appropriate supporting documents showing the amount that Barbara Jean Cummings is entitled to as the constructive *cestui que* trust, that is, the amount she would have received had Dennis Cummings complied with the divorce decree. The defendants will then be allowed an opportunity to comment on the plaintiffs' submission, and the Court will then determine the amount to be awarded, if necessary.

4. It follows from the foregoing that the motion to dismiss The First Wisconsin Trust Company must be denied. While this defendant played no role in the decision to deny benefits to Barbara Jean Cummings, and could play no such role by the terms of the Plan, it is in actual possession of the proceeds forming the constructive trust *res*. In view of the relief awarded to plaintiffs as against the Plan and the Retirement Committee, it would be anomalous to dismiss the claim for benefits against this defendant. The motion is denied.

5. The second claim for relief is based on 29 U.S.C. § 1025(a), which provides:

> Statement furnished by administrator to participants and beneficiaries. Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—
>
> (1) the total benefits accrued, and
> (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable [,]

and 1132(c) quoted earlier. The claim arises out of the series of correspondence between Barbara Jean Cummings and the Retirement Committee following Dennis Cummings's death, in which benefits were requested and denied.

The damages available under § 1132(c) are punitive in nature and are awarded in the Court's discretion. In this case, the plaintiffs allege that the Retirement Committee informed them that Barbara Jean Cummings was entitled to no benefits whatever, and the Retirement Committee's letters, which have been submitted to the court as exhibits, provide the Retirement Committee's reason for its decision. Although the Court has reached a contrary conclusion, the Retirement Committee's conduct cannot be regarded as so egregious as to prompt the imposition of a penalty. It did not deliberately withhold information; it simply stated the conclusion that no benefits were due and the reasons supporting that conclusion. This is not the sort of obstinate or reckless conduct that § 1132(c) was designed to redress. Alternatively, I hold that plaintiffs have not adequately prosecuted this claim for relief. Summary judgment for the defendants with respect thereto is appropriate on either ground.

6. There remains the unopposed motion of defendants to strike the plaintiffs' jury demand. The motion is granted.

In summation, the motion to compel discovery is denied; the motion to dismiss Frank J. Sprtel from the action is granted; partial summary judgment for the plaintiffs is granted on plaintiffs' claim for benefits; the motion to dismiss The First Wisconsin Trust Company is denied; summary judgment for the defendants is granted on plaintiffs' claim for statutory penalties; and the motion to strike the jury demand is granted. The parties will submit to the Court documents directed to the issue of the amount of benefits to be awarded as set forth in this order, unless they can settle this issue.

IT IS THEREFORE ORDERED that the plaintiffs' motion to compel discovery is denied.

IT IS FURTHER ORDERED that the defendants' motion to dismiss defendant Frank J. Sprtel is granted.

IT IS FURTHER ORDERED that the plaintiffs' motion for partial summary judgment is granted with respect to their first claim for relief.

IT IS FURTHER ORDERED that the defendants' motion to dismiss defendant The First Wisconsin Trust Company is denied.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is denied with respect to plaintiffs' first claim for relief, and is granted with respect to plaintiffs' second claim for relief.

IT IS FURTHER ORDERED that defendants' motion to strike plaintiffs' jury demand is granted.

IT IS FURTHER ORDERED that unless the parties agree on the amount to be awarded to plaintiffs, plaintiffs shall within ten days of the filing date of this order serve and file an affidavit and any necessary supporting exhibits showing the amount Barbara Jean Cummings would have received had she been designated as a beneficiary under Dennis Cummings's and LaVerne Cummings's decree of divorce. The defendants shall have ten days thereafter to serve and file and pleadings or documents in opposition thereto.

Dated at Milwaukee, Wisconsin, this 19 day of April, 1985.

BY THE COURT;

/s/ JOHN W. REYNOLDS
Chief U.S. District Judge

# APPENDIX C

[Filed September 27, 1985]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARBARA JEAN CUMMINGS, a minor, by her Guardian ad Litem, WILLARD P. TECHMEIER, and LAVERNE H. CUMMINGS, Special Administratrix of the Estate of DENNIS G. CUMMINGS,

*Plaintiffs,*

v.

BRIGGS & STRATTON RETIREMENT PLAN, THE FIRST WISCONSIN TRUST COMPANY, plan trustee, and BRIGGS & STRATTON RETIREMENT COMMITTEE,

*Defendants.*

C.A. No. 83-C-722

## DECISION AND ORDER

This is an action for benefits under the Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Federal jurisdiction is based on 28 U.S.C. § 1331. On April 19, 1985, the Court ordered that summary judgment on plaintiffs' first claim for relief be granted. In my decision, I concluded that plaintiffs had made a showing of unjust enrichment and that a constructive trust should be imposed on certain proceeds within defendants' control. I also ordered the parties to brief the issue of damages. Presently before the Court are the defendants' motion for reconsideration of the April 19th

order and the parties' submissions on the damages issue. The motion for reconsideration will be denied, and the defendants' calculations of the damages will be adopted, with a minor modification.

The motion for reconsideration raises three arguments. First, defendants argue that the Retirement Equity Act of 1984 (effective January 1, 1985) amends § 206(d) of ERISA [29 U.S.C. § 1056(d)] in a manner that forbids the relief ordered in the Court's April 19th order. The amended subsection now provides in part:

> (d) Assignment or alienation of plan benefits.
> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.
>
> . . . .
>
> 3(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.
> (B) For purposes of this paragraph—
> (i) the term 'qualified domestic relations order' means a domestic relations order—
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
> (II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
> (ii) the term 'domestic relations order' means any judgment, decree, or order (including approval of a property settlement agreement) which—

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies—

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order—

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. § 1056. The defendants argue that the Court's order assigned benefits to Barbara Jean Cummings, yet it does not meet the requirements of a "qualified domestic order" under the new law.

The Court's order of April 19, 1985 merely enforced by the vehicle of the law of constructive trusts a right pre-existing by virtue of the Milwaukee County Circuit Court's decree of divorce. In this regard, Act of Aug. 23, 1984, P.L. 98-397, Title III, § 303, 98 Stat. 1452 provides in part:

> (d) Amendments relating to assignments in divorce, etc., proceedings. The amendments made by sections 104 and 204 [amending 29 USCS §§ 1054(d)(3), 1144(b)(7); 26 USCS §§ 72, 401, 402, 414] shall take effect on January 1, 1985, except that in the case of a domestic relations order entered before such date, the plan administrator—
>
> (1) shall treat such order as a qualified domestic relations order if such administrator is paying benefits pursuant to such order on such date, and
>
> (2) may treat any other such order entered before such date as a qualified domestic relations order even if such order does not meet the requirements of such amendments.

While the administrator was not paying benefits to Barbara Jean Cummings on the effective date of the new legislation, this Court's previous decision recognized his equitable duty to do so. I conclude that the amendments to § 1056 have no bearing on my disposition of this action.

The defendant's second argument is that the Court has ordered the retirement plan fiduciaries to violate § 404(a)(1)(D) of ERISA [29 U.S.C. § 1056(a)(1)(D)] by requiring a distribution of plan assets not in accordance with the documents and instruments governing the plan. This argument goes straight to the merits of my decision to impose a constructive trust, and would be more properly addressed to the Court of Appeals. Suffice it to say that a strict application of the terms of the plan in this case would unjustly enrich the defendants.

The last argument is that the Court erred in finding that Mr. Cummings's response to the defendants' 1978

mailing was evidence of his ignorance of the terms of the plan. Insofar as the materials sent to Mr. Cummings refer to a survivorship option available only to married persons, the argument is correct. Yet this provides no basis for reconsidering my decision on the merits, because the question of whether Mr. Cummings's omission to designate Barbara Jean as beneficiary was willful or neglectful is irrelevant to the ultimate disposition of the dispute. As I stated in the previous decision, "I need not determine whether Mr. Cummings's omission was deliberate, because equity provides a remedy that would be available to plaintiffs in either instance." 606 F.Supp. 659, 663 (E.D. Wis. 1985). The motion for reconsideration is denied.

Turning now to the issue of damages, much of the disagreement is the consequence of plaintiffs' view that the damages should be treated as a lump sum payable upon Mr. Cummings's death, and defendants' contrary view that the damages should reflect the present value of a stream of future payments plus the sum of payments already due.

The Court intends that Barbara Jean be placed in the position she would have been in had she been designated a beneficiary pursuant to her parents' divorce decree, and the Court's order reflected this intention. Plaintiffs have not pointed to any provision in the retirement plan permitting an accelerated lump-sum payment of benefits to the surviving beneficiaries of plan participants, and there is no evidence to suggest that Barbara Jean would have been treated any differently from other surviving beneficiaries. Thus, to award damages in the form of a lump-sum payment of all the benefits due her would place Barbara Jean in a superior position than that which she would have enjoyed had she properly been designated a beneficiary.

The correct amount of damages is the sum of the payments already due, the interest thereon, and the present value of the stream of remaining future payments. The parties agree that the relevant period of payments is ten

years, and that the amount Barbara Jean would have received each month is $642.58. Dennis Cummings died on August 1, 1982, and payments to a survivor would begin the first day of the following month, that is, September 1, 1982. Because three years will have passed between the date of the first payment that would have been made and the end of this month, the amount of past-due benefits is calculated as follows:

$$\$642.58 \times 12 \times 3 = \$23,132.88.$$

The interest on this amount is calculated by applying the statutory rate of interest, twelve percent, against the average principle due, $11,566.44. Thus:

$$.12 \times \$11,566.44 = \$1,387.97.$$

The total amount already due, therefore, is determined thus:

$$\$23,138.88 + \$1,387.97 = \$24,520.85.$$

As stated above, the balance of the damages is comprised of the present value of the remaining stream of payments. Because seven full years of payments remain, the total amount of payments each year can be calculated as follows:

$$\$642.58 \times 12 = \$7,710.96.$$

For each year remaining, a discount factor is applied against $7,710.96 to yield the present value of that amount. The plaintiffs argue that if this method of calculation is approved, the discount factor should be determined by using an interest rate of ten percent to reflect changing conditions in the national economy. However, the correct rate to apply is the statutory rate of twelve percent. The discount factor (F) applied to each yearly amount is determined as follows:

$$F = 1/(1+.12)^{\text{number of years deferred}}$$

Therefore the total present value of the remaining future payments is calculated as follows:

| year | amount | | discount factor | | present value |
|---|---|---|---|---|---|
| 9/85 - 8/86 | $7,710.96 | × | .893 | = | $ 6,885.89 |
| 9/86 - 8/87 | $7,710.96 | × | .797 | = | $ 6,145.64 |
| 9/87 - 8/88 | $7,710.96 | × | .712 | = | $ 5,490.20 |
| 9/88 - 8/89 | $7,710.96 | × | .636 | = | $ 4,904.17 |
| 9/89 - 8/90 | $7,710.96 | × | .567 | = | $ 4,372.11 |
| 9/90 - 8/91 | $7,710.96 | × | .507 | = | $ 3,909.46 |
| 9/91 - 8/92 | $7,710.96 | × | .452 | = | $ 3,485.35 |
| | | | Total | = | $35,192.82 |

This amount, added to the total amount of payments already due and the interest thereon yields a sum of $59,713.67. Judgment will be entered accordingly.

THEREFORE, IT IS ORDERED that defendants' motion for reconsideration is denied.

IT IS FURTHER ORDERED that judgment be entered in favor of the plaintiffs in the amount of $59,713.67 with interest thereon at the rate provided by law.

Dated at Milwaukee, Wisconsin, this 27 day of Sept., 1985.

BY THE COURT;

/s/ JOHN W. REYNOLDS
Chief U.S. District Judge